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# THE FRENCH JUDICIARY

## I

### STATUTORY BASIS

In France as in most continental European countries, the judiciary is not a constitutional creation. The organization of the courts, their jurisdiction, the mode of appointment and removal of the judges, their qualifications, and their tenure are all matters which are regulated entirely by statute. The silence of the present constitution on this, as on so many other matters customarily dealt with in the fundamental law, is explained in part by the peculiar circumstances under which it was framed, and in part by the view which still widely persists in France, that the judiciary is merely a branch of the executive department.<sup>1</sup> This failure to accord the judiciary a place in the constitution as one of the "great public powers" has called forth many expressions of regret from French writers who complain that the effect has been to degrade it to the position of a *fonction* whereas it should be regarded as a *grande pouvoir*, to reduce it to a state of dependence upon the executive power, and to diminish the great rôle which it should play in the life of the state.<sup>2</sup> This dependence is one reason why, we are told, the French judiciary has never asserted or exercised the right to declare unconstitutional acts of the legislature null and void.<sup>3</sup>

Some French commentators, however, argue that the silence of the present constitution in respect to the judiciary is no proof that it was intended to be regarded as merely a branch of the executive power, and they point out that in most of the earlier constitutions of France it was in fact treated as one of the great departments, usually a separate chapter or title being devoted to

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<sup>1</sup> Compare on this point Dehesdin, *Le recrutement et l'avancement des magistrats*, p. vi; Larnaude (REVUE DES INDÉES May 15, 1905); Berthélemy, *Droit administratif* (6th ed.) p. 12, who regards the judiciary as a branch of the executive power; Esmein, *Droit constitutionnel* (5th ed.) p. 17, who adopts the contrary view. Generally the administrative jurists reject the tripartite theory.

<sup>2</sup> Compare on this point the observations of Coumoul in his *Traité du pouvoir judiciaire*, chaps. i, iii, and vi.

<sup>3</sup> See my article on Judicial Control of Legislative and Administrative Acts in France, 9 AMER. POL. SCI. REV. especially, pp. 657 ff.

the *pouvoir judiciaire*.<sup>4</sup> It seems quite clear that the reason why the authors of the present constitution neglected the judiciary is to be found, as stated above, in the peculiar circumstances under which they sat and in the belief that their work should be restricted to the preparation of a provisional instrument dealing mainly with the organization of the executive and legislative powers, and the defining of their relations.<sup>5</sup>

## II

### UNITY OF CIVIL AND CRIMINAL JUSTICE

Another distinguishing characteristic of French judicial organization is to be found in what the French call the unity of civil and criminal justice. This does not mean that civil and criminal actions are tried according to the same rules of procedure, but that the same courts which hear and determine civil actions also try criminal cases. The desirability of separate courts for the trial of criminal and civil cases has never commended itself to the French in the same degree that it has to the English, or even to the Americans. It is true that the superior courts are divided into civil and criminal chambers, as is the custom generally on the continent, but these chambers are not regarded as separate courts but merely subdivisions of the same tribunal. Thus, the court of assizes, which tries crimes, is not an independent autonomous court, but a special organ constituted from the personnel of the court of appeal. So the tribunal of correction for the trial of misdemeanors and less important crimes is a branch of the civil tribunal of first instance.

On the other hand, there has existed in France for a long time a separate and distinct set of tribunals for the determination of administrative controversies; that is to say, controversies arising between the administrative authorities and private individuals. As is well known, the theory of administrative jurisdiction originated at the time of the Revolution and was founded on the desire of the Revolutionists to free the administrative authorities from

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<sup>4</sup> Compare Marchand, *Le recrutement de la magistrature*, pp. 26, 31; Coumoul, *op. cit.*, chap. iii.

<sup>5</sup> Some authorities consider the question to be of academic interest merely; they contend that in fact the judiciary is as independent of the government as it would be if it were a constitutional creation, unless, of course, the system of popular election were adopted.

the control of the judicial tribunals, the judges of which were suspected of hostility to the reforms introduced in consequence of the Revolution.<sup>6</sup> At first, administrative controversies were heard and determined by the administrative authorities, but, in time, there grew up a distinct system of administrative courts by the side of the judicial courts, and this system remains to-day, notwithstanding the fact that the particular danger which the law of 1790 was designed to meet (the hostility of the judges to the Revolutionary reforms) has long since disappeared. The two systems of courts are entirely separate and independent each of the other; each has its own organization, its own judges, and its own jurisdiction, and questions involving conflicts of jurisdiction between them are determined by a special tribunal of conflicts.

### III

#### LOCALIZATION OF THE COURTS

Another feature of French judicial organization which forms an interesting contrast to the English and American systems is found in the sedentary character of the French courts; that is to say, they always sit in the same place. Thus, each court of appeal sits in the chief town of the district, each tribunal of first instance sits in the *chef lieu* of the *arrondissement*, etc. The French judges never go on circuit from one town to another, as is common in England and America. Every court has its permanent seat and litigants must come to it. There was considerable sentiment at the time of the Revolution in favor of introducing the English system of circuit judges (*juges ambulantes*) but on this proposition, as on others, the "Anglicans" were out-voted. Proposals have been made at different times in recent years to reduce the number of tribunals of first instance (there are now 359), and require the judges of those which remain to go on circuit and hold court in different parts of the larger districts which it has been proposed to create, but as yet the opposition to the scheme has prevented its adoption.<sup>7</sup> The judges themselves

<sup>6</sup> The origin of the administrative jurisdiction is discussed by the writer in an article on Judicial Control of Administrative and Legislative Acts in France, *loc. cit.*, and by Duguit, *The French Administrative Courts*, 29 POL. SCI. QUART. pp. 386, 388.

<sup>7</sup> See Picot, *La réforme judiciaire*, p. 436. Such a proposal was contained in a judicial reorganization bill introduced in 1915 by M. Viviani,

have strongly opposed the suggestion because, among other reasons, it would compromise the dignity of the magistracy, and expose the judges to additional expense and inconvenience.<sup>8</sup>

#### IV

##### COLLEGIAL ORGANIZATION OF THE COURTS

Still another feature of French judicial organization which distinguishes it from that of England and the United States is the system of *pluralité des juges*. All the French courts, except those held by the justices of the peace, are collegial in organization; that is, they are held by several magistrates. Thus the tribunals of first instance are composed of from three to fifteen judges; the court of assizes of three judges (a president and two assessors); the courts of appeal, of at least five judges, called councillors (until 1883, at least seven); and the Court of Cassation by forty-nine councillors. In France no judgment is valid (except those of the courts of the justices of the peace) unless it is rendered by at least three judges. The idea of a court held by a single judge, which Bentham so strongly recommended, has never gained a firm foothold in France. There the view of Montesquieu, that "there is no place for a single judge in any but despotic states" has been dominant. *Juge unique, juge inique*, runs an old French proverb. Throughout all the periods of French history the notion has persisted that to a certain extent the authority of a judgment is in proportion to the number of judges who render it. Plurality of judges, says Coumoul, one of the most highly respected French magistrates and writers on the judiciary, is an essential of good justice. This principle, he adds, existed during the *ancien régime* and the reformers of 1790 found no fault with it. It increases, he argues, the safeguards against arbitrariness, enables the courts to resist more effectively the influence of the public prosecutor and the pressure of the government, is more in accord with the habits and mental

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minister of justice. Dufaure, prime minister in 1876, advocated this reform as a means of reducing the excessive number of judges.

<sup>8</sup> Dehesdin, *op. cit.*, p. 474; Picot, *op. cit.*, p. 288. Dehesdin points out that the system has no such results in England where the sheriff meets the judge upon his arrival, in red robe and livery, and accompanies him with coach and four to the quarters reserved for his lodging and entertainment.

aptitudes of the Latin race, and adds dignity and solemnity to the trial.<sup>9</sup> But there have always been adversaries in France of the system of *pluralité*. The question was discussed in Parliament as early as 1830, and a breach in the system was actually made when the number of assessors of the court of assizes was reduced from four to two. Nearly half a century ago the principle of a single judge for the inferior courts was advocated by the great orator and advocate, Odillon Barrot, who denounced as false the notion that the value of a judgment is in proportion to the number of judges who render it. M. Barrot also pointed out that plurality destroys responsibility.<sup>10</sup>

In recent years there has been a lively discussion of the subject in France and the sentiment in favor of a single judge for the lower courts is undoubtedly increasing, but it can hardly be said to be general. Among the leading advocates of the proposed change is M. Cruppi, a former minister of justice and a prominent Parisian advocate. Whatever may be the number of judges, whether three or twenty, says M. Cruppi, there is usually one who dictates the judgment without taking the responsibility.<sup>11</sup> The extension of the jurisdiction of the justices of the peace by an act of Parliament in 1905 would seem to indicate that the old distrust of justice administered by a single magistrate is to some

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<sup>9</sup>*Traité du pouvoir judiciaire*, pp. 371, 385. Compare also Picot, *op. cit.*, p. 241, who remarks that the idea of a single judge is dangerous. Cruppi, *La Cour d'Assises*, p. 147, quotes a French observer who was struck by the lack of solemnity which characterized a trial by a single judge, which he attended at the Old Bailey in London.

<sup>10</sup> See his book, *De l'organisation judiciaire*, p. 69.

<sup>11</sup> See his book, *La Cour d'Assises*, p. 145. In 1906 M. Cruppi in his report on the budget of the ministry of justice advocated the substitution of a single judge for the tribunals of first instance. It was again advocated by the reporter of the budget of the ministry of justice in 1909. The late Professor Raymond Saleilles of the University of Paris, one of the most distinguished publicists of France, was also an advocate of this reform. BULLETIN DE LA SOCIÉTÉ GÉNÉRALE DES PRISONS (1903) p. 993. Still another advocate of the proposed change is the well-known criminologist, M. Loubat, *procureur-général* at Lyons. The notion that plurality of judges increases the safeguards of the accused, M. Loubat repudiates, and he cites the celebrated cases of Thou, Valette, Cinq Mars, and the duc d'Enghein as evidence that the system of plurality is not necessarily a safeguard against judicial despotism. See his article entitled, *Les idées de E. Faguet sur la justice moderne*, 72 REV. POL. ET PARL. p. 258. See also a similar line of argument by M. Julien Lefèvre in an article entitled, *Le premier acte de la réforme judiciaire*, 69 REV. POL. ET PARL. especially, pp. 483-484.

extent disappearing. It may also be remarked that the important judicial functions of referee in Paris are performed by a single magistrate. Finally, it is well known that although the court of assizes is held by three judges the trial is in fact conducted by the president of the court, his two colleagues being merely silent spectators.<sup>12</sup> In 1907 M. Cruppi, then minister of justice, brought in a bill providing that all courts of first instance should be held by a single judge. In the *exposé des motifs* which accompanied the bill, it was argued that the system of plurality of judges was not necessarily a guarantee of justice; that the assessors were often mere automata, being dominated by the presiding judge; and that it tended to destroy responsibility.<sup>13</sup> The bill, however, was not favorably received. In the debates of 1910-1912 on the juvenile court bill, many members favored a single judge for the proposed court; it was advocated by Senator Bérenger and other juvenile court reformers and was recommended by the senate committee to which the bill had been referred. But the old prejudice against trials by a single judge asserted itself, and the court as finally provided for consists of a chamber constituted out of the tribunal of first instance.

In 1915, M. Viviani, then minister of justice, brought in a bill providing for the substitution of a single judge in the tribunals of first instance and in the courts of assizes, except that in grave cases the judge was to be allowed to call in a colleague in a purely advisory capacity. But it was not passed by either chamber.

The personnel of the magistracy is still further augmented by a small army of supplementary judges (*juges suppléants*), for which provision appears to have been first made in 1830.<sup>14</sup> The number attached to each tribunal of first instance varies from one to six, except in the case of the tribunal of the Seine, where there are twenty. The total number in France is over 800. They

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<sup>12</sup> See my article on Criminal Procedure in France, 25 YALE LAW JOURNAL, especially, p. 262. Nevertheless, the two assessors deliberate with the presiding judge and have a vote in fixing the sentence.

<sup>13</sup> 24 REV. DE DROIT PUB. p. 348. Judge Coumoul, however, criticizes the proposal. See his *Pouvoir judiciaire*, p. 376.

<sup>14</sup> In 1808 Napoleon created a body of auditor judges. They were stagiary magistrates charged with conducting examinations, interrogatories, and other preparatory judicial functions. They were abolished in 1830, however, and provision made for supplementary judges. Malepeyre, *La magistrature en France*, p. 95.

have a consultative voice in the deliberations of the tribunal to which they are attached and a vote whenever they take the place of a judge whose presence is necessary to the validity of a judgment.<sup>15</sup> They are young magistrates—*débutants*—and as a body they serve as a sort of recruiting ground for the higher magistracy.<sup>16</sup> About one-third of the total number receive a small salary (\$300 a year); the rest receive nothing. Their future is not assured, for after serving four or five years without salary they not infrequently see others promoted over them through political favoritism. So unpromising is their future that in recent years the number of applicants has been far below the number of vacancies. The abolition of the supplementary judge has frequently been proposed in recent years.<sup>17</sup>

## V

## THE EXCESSIVE NUMBER OF JUDGES

As a result of the large number of tribunals and courts,<sup>18</sup> their collegial organization, and the system of supplementary judges, the judicial personnel of France is extraordinarily large, and forms a striking contrast to that of England, where the total number of judges of all kinds scarcely exceeds one hundred.<sup>19</sup>

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<sup>15</sup> Bonfils, *Traité élémentaire d'organisation judiciaire, de compétence et de procédure, etc.*, p. 13.

<sup>16</sup> Picot, *op. cit.*, p. 307.

<sup>17</sup> Cf. Rengade, *La magistrature et la démocratie*, 79 *REV. POL. ET PARL.* p. 498; Loubat, 72 *ibid.*, p. 260.

<sup>18</sup> In France the inferior judicial bodies are designated as "tribunals," the term court (*cour*) being reserved for the higher jurisdictions, such as the courts of assizes, courts of appeal, and the Court of Cassation. The titularies of the "tribunals" are called judges (*juges*); those of the courts, councillors (*conseillers*).

<sup>19</sup> The English master of judicial statistics in a letter of April 16, 1903, addressed to Hon. Joseph H. Choate, then American ambassador to Great Britain, stated that twenty-three judges sitting at London handled all the litigation of England and Wales with a total population of 32,500,000. See *Report of the New York Commission on the Laws Delays*, pp. 76, 106. This statement remarkable enough does not appear, however, to be quite true. In fact, the judicial force of England consists of twenty judges of the King's Bench, about sixty recorders in the larger towns and cities, the justices of the peace in the counties (the number of which in some counties is very large, but the actual duties of which are performed by a small number of magistrates), the Master of the Rolls, and five Lords



Odillon Barrot, the leader of the French bar half a century ago, complained that the number of judges in France was even then excessive, being far greater than the judicial needs of the country required. According to him, the number of magistrates in 1872 was as follows: 2,939 justices of the peace; 2,968 judges of first instance; 780 councillors of the courts of appeal and of the Court of Cassation; a total of 6,687.

To this it was necessary to add 1,036 members of the *ministère publique* (attorneys-general, prosecuting attorneys, etc.) making a total of 7,723 members of the sitting and standing magistracies.<sup>20</sup>

In 1883 the magistracy underwent an *épuration* in consequence of which there was a slight reduction in the personnel, but since then there have been some augmentations, so that it is safe to say that there are still between five and six thousand judges, not counting the members of the standing magistracy.

Everybody in France to-day admits that this number is excessive, and successive ministers of justice in recent years have urged a reduction. Judicial reformers and writers for the past seventy-five years have dwelt upon the evil. Benjamin Constant, leader of the Liberal party during the periods of the Restoration and the July monarchy, advocated such a reform.<sup>21</sup> So did Odillon Barrot,<sup>22</sup> Jules Favre,<sup>23</sup> Prévost-Paradol,<sup>24</sup> the duc de Broglie,<sup>25</sup>

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justices of the court of appeal (in addition to the presidents of the three divisions of the High Court); and a sergeant and two judges of the Court of the City of London. In 1907 a court of criminal appeal was created, but it is held by judges of the King's Bench Division of the High Court. There are also four Lords of Appeal in ordinary, who exercise the judicial functions of the House of Lords, and there is the judicial committee of the Privy Council, but their members are peers rather than members of the regular judiciary. See Lowell, *The Government of England*, Vol. II, chap. ix; and Lawson and Keedy, *Criminal Procedure in England*, 1 AMER. JOUR. OF CRIM. LAW AND CRIMINOLOGY, pp. 599, 763 ff.

<sup>20</sup> The French divide the magistracy into two parts: the *sitting* magistracy, composed of the judges of the tribunals and the councillors of the higher courts; and the *standing* magistracy, which consists of the *procureurs*, *procureurs-généraux*, *avocats-généraux*, etc. Jules Favre, in his *De la réforme judiciaire*, p. 37, estimated the total number of sitting magistrates in France and Algeria at 5,444.

<sup>21</sup> *Cours de politique constitutionnelle*, Vol. I, p. 154.

<sup>22</sup> *De l'organisation judiciaire*, pp. 13, 67, 68.

<sup>23</sup> *De la réforme judiciaire*, pp. 37, 112 ff.

<sup>24</sup> *La France nouvelle*, p. 201.

<sup>25</sup> *Vues sur le gouvernement*, p. 142.

and Gambetta during the early days of the present Republic. More recently the need of this reform has been urged by a host of well-known writers on the judiciary.<sup>26</sup>

It is especially the tribunals of first instance that are the objects of attack. It will be remembered that there is one such tribunal for each of the administrative arrondissements—359 altogether—and each tribunal is composed of from three to fifteen judges, to say nothing of the staff of recorders, *procureurs*, *avoués*, *huissiers*, etc., attached to each. Some of these arrondissements, particularly those situated in the mountainous regions of eastern and southeastern France, are sparsely settled, and their tribunals have little business to occupy their time.<sup>27</sup> In a goodly number of them the tribunals actually handle less than one hundred cases a year.<sup>28</sup>

Many proposals have been made in and out of Parliament since 1876 for a reduction of the judicial personnel either through the substitution of a single judge in the tribunals of first instance, or through the abolition of those tribunals which are least occupied with business. Reporters of the judicial budget and even ministers of justice themselves year after year have advocated one or the other of these proposals.<sup>29</sup> M. Viviani, minister of justice in 1915, introduced and advocated a bill providing for a substantial reduction through the abolition of the system of plurality in the lower courts; the suppression of more than one-half

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<sup>26</sup> Notably by Picot, *La réforme judiciaire*, p. 264; Malepeyre, *Le recrutement de la magistrature*, pp. 6, 238; Cruppi, *La Cour d'Assises*, chap. iv; Dehesdin, *La recrutement et l'avancement des magistrats*, pp. 155, 467; Le Fevre, 69 REV. POL. ET PARL. pp. 479 ff.

<sup>27</sup> Malepeyre, *op. cit.*, p. 6, speaks of tribunals "completely unoccupied" and he adds that it is "debasement to the character of a judge to occupy a salaried post which requires no work." For the same view see Picot, *op. cit.*, 266.

<sup>28</sup> Picot writing in 1881 stated that there were 98 tribunals which decided less than 100 cases a year, and that there were 102 others that judged between 100 and 150 only. *Op. cit.*, p. 265. Dehesdin states that during the year 1908 the tribunal of Nyons tried only 65 cases; that of Florac, only 74; that of Villefranche, only 71; that of Barcelonnette, only 52; that of Castellane, only 34. *Op. cit.*, p. 468.

<sup>29</sup> The reporter of the budget of the ministry of justice in 1909 protested against the excessive number of judges and declared it to be a disgrace that courts were maintained which handled less than one hundred cases a year. The complaint was reaffirmed in 1911. *Ch. des Deps.* (1912) No. 1870, p. 2.

of the 359 tribunals of first instance; and the reduction of the number of councillors of the courts of appeal from five to three.<sup>30</sup>

The proposal to reduce the judicial personnel through the substitution of the system of a single judge has been opposed for reasons stated above. The proposal to abolish the "unoccupied" tribunals has encountered opposition from various quarters. In the first place, those which handle the fewest number of cases are in the mountainous regions of eastern and southeastern France where the railway facilities are the poorest and where, in consequence, the seat of the tribunal is often twelve or fifteen hours distant from the remote parts of the district. To abolish, therefore, these tribunals and require litigants to take their cases to the tribunal of a neighboring district or to the seat of the *département* in case one tribunal only should be retained for each such circumscription, would impose a great hardship upon those who are least able to bear it.<sup>31</sup> In the second place, the local opposition to the abolition of a tribunal, the presence of which with its galaxy of judges, procurators, solicitors, advocates, etc., adds much to the importance and prestige of the town in which it sits, has heretofore been one of the chief obstacles to the realization of this much-needed reform. These towns are very jealous of their local pride, and the suppression of their tribunal would seriously wound their *amour propre*.<sup>32</sup> Every such proposal, therefore, is vigorously combated by the local member of Parliament. We in the United States know well how difficult it has been to get rid of useless customs districts, army posts, navy yards, and the like, because of the opposition of the locali-

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<sup>30</sup> The number of the courts of appeal (there are twenty-seven) might also be reduced through the abolition of those least occupied and the consolidation of others, for example, those at Chambéry, Bastia, Agen, Besançon, Poitiers, Nîmes, Toulouse, Dijon, and Rouen, most of which handle less than one hundred cases each. Cf. Dehesdin, *op. cit.*, p. 475; Favre, *op. cit.*, p. 114.

<sup>31</sup> Cf. Picot, *op. cit.*, p. 274.

<sup>32</sup> Compare a speech of the minister of justice in the Senate, June 19, 1914, JOURNAL OFFICIEL, p. 752. A provincial deputy speaking on such a proposal in 1849 remarked that, "Paris might easily spare a few magistrates; that they were scarcely noticeable by one who visited the art galleries, museums, libraries, etc., but to mutilate the magistracy of a poor provincial town would be to extinguish these modest *foyers* from which radiate some streams of knowledge. What would be left? Silent streets, deserted squares, and a population whose only star had been put out." Quoted by Picot, *op. cit.*, p. 274.

ties affected and of their representatives in Congress. The problem of abolishing useless courts and judges in France has been complicated by similar difficulties. The French deputies are generally agreed that there should be a substantial reduction, but when it is proposed to apply the remedy in a particular place the opposition at once asserts itself.

Finally, the abolition of any considerable number of courts would entail large expense to the state on account of the necessity of providing pensions for the judges thus legislated out of office, and of indemnifying the solicitors, recorders, and other ministerial court functionaries who, in consequence of the surviving remnant of the old system of *venalité*, have a property right in their offices and can be deprived of them only by expropriation.

## VI

### MODE OF APPOINTMENT

All judges in France from the highest to the lowest, except the members of the councils of *prud'hommes* and the commercial tribunals,<sup>33</sup> are appointed by the President of the Republic, which means in fact appointment by the minister of justice. In 1790, however, the Revolutionists introduced the system of popular election in consequence of the doctrines of popular sovereignty and the separation of powers which were then dominant. The results of the first elections, which took place in 1790, were not disappointing, at least in Paris, and a number of well-qualified and even distinguished jurists were chosen, among them Tronchet, Thouret, Trétean, Merlin, Treilhard, Duport, and Herault de Séchelles, who constituted the *élite* of the Parisian jurisconsults.<sup>34</sup> The electors, however, manifested a distressing indifference, hardly more than one-sixth of them participating in the election.<sup>35</sup> With the establishment of the Republic and the ascendancy of the popular party, the judges elected in 1790 fell under suspicion and were denounced by some of the Radicals

<sup>33</sup> The former are chosen by an electorate composed of employers and employees; the latter by an electorate consisting of certain categories of persons representing the business and commercial interests.

<sup>34</sup> Dehesdin, *op. cit.*, p. 32. The results in the provinces, however, were less satisfactory; cf. Seligman, *Justice pendant la Révolution*, p. 357.

<sup>35</sup> Picot, *op. cit.*, p. 27. In Paris scarcely more than 300 electors voted, but Picot adds that they constituted the "*élite* of the electorate."

like Danton as being disloyal aristocrats and docile instruments of despotism who were hostile to the principles of the Revolution.<sup>36</sup> The demand for an *épuration* of the magistracy was accordingly made and new elections were ordered by the National Assembly to be held in 1793 before the expiration of the terms of the sitting judges.

At the same time the tax-paying qualification for voting was abolished and even bankrupts and insolvents were made electors. Likewise all qualifications for eligibility to the magistracy were removed and every citizen twenty-five years of age, who was not a servant or a beggar, was declared eligible to election, so great was the hostility to what Danton characterized as the "revolting aristocracy of the men of law." The results of the election of 1793 were deplorable. The election was marked by the fiercest political passion and the mediocrity of the judges elected, says Picot, was only equalled by their obscurity. Only three of the distinguished magistrates chosen in 1790 were re-elected and of the fifty-one judges and *suppléants* chosen in Paris, only three were lawyers. Among those elected were engravers, stonecutters, clerks, laborers, and gardeners, and some were without any profession at all.<sup>37</sup> As in 1790 the indifference of the electors was deplorable.<sup>38</sup> The public had no confidence in such a magistracy and litigants generally preferred to settle their disputes by arbitration.

Napoleon put an end to the system of popular election. At first he retained it for the choice of justices of the peace but even as to these it was a failure,<sup>39</sup> and, after a brief experiment (1802-1804) with the system of presentation by the electors, Napoleon in 1804 abolished the last remnant of the system of popular election, and substituted the method of appointment by the executive, a method which has been continued without interruption until now.

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<sup>36</sup> Douarche, 46 REV. POL. ET PARL. pp. 138-139.

<sup>37</sup> Picot, *op. cit.*, p. 30. Laboulaye, *La parti liberale*, p. 231; Brissaud, *Historie de droit français public* (Eng. trans. by Garner) p. 561; Malepeyre, *op. cit.*, chap. iii; Marchand, *op. cit.*, p. 51.

<sup>38</sup> One judge was chosen by eighteen votes. The tribunal at Merlun was elected by thirty-one voters. Malepeyre, *op. cit.*, p. 217; Dehesdin, *op. cit.*, p. 34.

<sup>39</sup> Everywhere the justices of the peace were declared to be incompetent. In some cities, notably Aix-Marseilles, most of them were common laborers.

The unhappy results of this early experience with an elective judiciary greatly discredited the system and from then until now there has been no widespread demand for its reintroduction. In 1848, there was some agitation in favor of a return to popular election, but the commission appointed by the National Assembly to study and report on the question of judicial reorganization repudiated it.<sup>40</sup> In the National Assembly which framed the present constitution a few members like Béranger, Goblet and Dufaure advocated the recruitment of the magistracy by examination as in Germany, but there appears to have been little or no sentiment in favor of popular election. During the parliamentary debate of 1882-83 on the reorganization of the judiciary a few members, of which Georges Clemenceau was the leader, advocated a return to the system of popular election. They argued that it was more in accord with the theories of popular sovereignty and the separation of powers; that the people were as competent to choose judges as they were to elect members of parliament; that they had demonstrated in 1790 their capacity to elect able magistrates; that they were then electing the commercial judges and councillors of *prud'hommes*<sup>51</sup> against which no complaints had been made; and, finally, they invoked the examples of Switzerland and the United States.<sup>42</sup> Clemenceau and his supporters were answered by M. Humbert, minister of

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<sup>40</sup> Dehesdin, *op. cit.*, p. 33.

<sup>41</sup> Who, says Jules Favre, handled nearly half the litigation of France. *Réforme judiciaire*, p. 29.

<sup>42</sup> Clemenceau in his speech of Jan. 22, 1883, denounced the system of appointment by the minister of justice as one which introduced politics into the judiciary and impaired the independence of the judges. "What confidence may we have in appointment by the government," he asked, "when we speak of the incapacity of the people? I return upon the keeper of the seals [the minister of justice] and ask him from whence he derives his capacity? It is to his portfolio that I address this question and the portfolio does not answer. But what does the keeper of the seals when he wishes to appoint a judge? He consults his bureaux—his bureaux which contain good recommendations of good deputies, good recommendations of good senators, good journalists, good functionaries, and good magistrates who tend naturally to perpetuate nepotism in their corporation. Then he makes a trial of these recommendations. This or that one is a friend of an influential man; it is necessary to disarm this one in order to gain the support of that one. It is in this way that judges are appointed whom the minister does not know and whom the bureaux do not know." Quoted by Dehesdin, *op. cit.*, p. 109. Other statesmen who advocated popular election were Jules Simon and Jules Favre.

justice, Waldeck-Rousseau and others who dwelt on the disastrous results which attended the system of popular election between 1790 and 1800, who asserted that the argument from Swiss and American experience was inconclusive because of the widely different conditions and the different mental and moral aptitudes of the French people; that popular election would endanger republicanism in the regions of the west where the monarchists were in the majority; that it would introduce politics into the administration of justice; and would destroy the unity of jurisprudence because justice in some communities would, under a system of popular election, be administered in accordance with local customs and ideas.<sup>43</sup> For the moment the advocates of popular election triumphed, and the Chamber of Deputies passed a bill providing for the election of the judges by the people, but upon reconsideration it later rescinded its action by a small majority. For a time after 1883 the question continued to be agitated and a flood of books and pamphlets designed to influence public opinion followed, but in recent years interest in the matter has declined and there is now no general demand for popular election. Of the various political parties and groups in France, the only one which advocates popular election is the Radical Party.<sup>44</sup> The prevailing view held in France has been thus stated by a well-informed student of the question:

"Because popular election works well in Switzerland and the United States is no argument for introducing it in France. The French have neither the wise toleration of the Swiss nor the practical spirit of the Americans. We pass easily from one extreme to the other and we often despair of institutions and men to whom we have accorded the greatest confidence."<sup>45</sup>

A mode of selection that has been widely advocated in France

<sup>43</sup> The debates are summarized in Dehesdin, *op. cit.*, pp. 102-111.

<sup>44</sup> See the platform of this party in Charpentier, *Le parti radical et radical socialiste, 1901-1911*, p. 263; Buisson, *La politique radicale*, p. 179.

<sup>45</sup> Marchand, *Le recrutement de la magistrature en France*, p. 95; *cp. also* Desjardin, *Questions sociales et politiques*, La magistr. élue; Picot, *op. cit.*, p. 328; Coumoul, *op. cit.*, p. 305, who remarks that popular election is more in accord with a republican constitution but that it is not practicable under existing conditions. A judge, says Coumoul, cannot be impartial in the presence of electors, some of whom are his supporters and others his adversaries. Besides, a judge must possess qualities which do not appeal to the electors.

and which is apparently the most favored by the partisans of judicial reform, is that of appointment by the executive from a list of candidates presented by the court in which the vacancy occurs, or from a list presented by the magistracy and the bar. The latter method of appointment was proposed by the commission on judicial reform of the National Assembly of 1848. A system of presentation by the courts was proposed by the commission on judicial reform in 1871 and a bill embodying this scheme was introduced and advocated by Jules Favre in 1877.<sup>46</sup> Prior to 1906 the customary procedure in making appointments to the bench was as follows: whenever a vacancy occurred, the president and the *procureur-général* of the court in which it took place presented a list of two or three candidates to the minister of justice who was of course free to make the selection from the list thus presented or not as he pleased. In fact he frequently did not, but instead appointed a candidate recommended by the deputy from the district, especially if the latter were a politician of influence and a political supporter of the government.

The influence exerted by the politicians and especially by members of parliament in the appointment of judges has long been a subject of widespread complaint and protest. There have always been some, however, who have inveighed against the practice. M. Briand, minister of justice in 1912, declared that the judges had become the prey of politicians. He denounced their interference in the appointment and promotion of magistrates and pleaded with his colleagues to renounce this "dangerous confusion of powers."

In recent years there has been a considerable demand in France for the creation of a judicial *novitiate* such as exists in Germany<sup>47</sup> and other continental countries, appointments to which shall be made on the basis of examination after a more extended study of law, and from which the higher positions in the

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<sup>46</sup> On the method of presentation see Picot, *op. cit.*, p. 334; Favre, *op. cit.*, p. 108; de Broglie, *Vues sur le gouvernement de la France*, p. 151. Prévost-Paradol in his *La France nouvelle*, p. 166, advocated a mixed system of presentation by the judiciary and the local elective assemblies. This system had the support of Odillon Barrot, Senators Bérenger and Goblet, and Judge Picot. More recently it has been advocated by the General Society of Prisons. *REVUE PENITENTIAIRE* (1906) p. 987.

<sup>47</sup> Where appointments to the magistracy are made only after examination and from candidates who have spent three years in the law faculty of a German university.



magistracy shall be recruited.<sup>48</sup> In obedience to this sentiment Parliament enacted in 1906 that, until an organic law on the subject had been passed, the professional qualifications for eligibility to the magistracy should be determined by an ordinance (*réglement*) issued by the President of the Republic, and that a table of promotions (*tableau d'avancement*) should be established, with a view to introducing the merit system in the method of appointments and promotions, thereby diminishing the evils of appointments of judges without sufficient legal training, upon the recommendations of politicians.

In pursuance of the authority granted by the law of 1906 a decree was promptly issued by the Sarien ministry<sup>49</sup> providing that in the future no one should be appointed to the magistracy who had not passed an examination, unless he was a member of the council of state, a member of the colonial magistracy, a member of a prefectural council, a functionary of four years' standing in the ministry of justice, an advocate of ten years' standing, a recorder, an ex-magistrate, a solicitor (*avoué*), a justice of the peace of two years' standing, and a few others. Permission to take the examination had to be obtained from the minister of justice and he was free to withhold it for any reason which seemed to him sufficient. The decree of 1906 marked an important step in the direction of restricting the discretion of the minister of justice, and of eliminating the abuse of political appointments and promotions; but it was strongly attacked both in and out of Parliament for various reasons, the chief of which was that it exempted from the examination requirement too many public officials, and left too much discretion in the hands of

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<sup>48</sup> Such a system was in fact introduced by Dufaure in the colonial magistracy in 1876 with good results but it fell into desuetude because it limited the power of appointment of the minister of justice. It appears, however, to have been revived in 1905. During the periods of the First Empire and the Restoration (1804-1830) there was a corps of auditors attached to the courts which constituted a sort of *pépinière* for the recruitment of the magistracy and it has been highly praised by some writers (*e. g.*, Picot) but it was abolished in 1830 and the system of *suppléant* judges took its place. Between 1838 and 1842 a long debate took place in Parliament on the question of establishing a judicial *novitiate* and it was strongly favored by great jurists like Portalis. In 1875 Dufaure established a system of examination for appointments to the position of substitute judge and the results are said to have been good, but it was soon abandoned for the system of political appointments.

<sup>49</sup> Text in Dehesdin, *op. cit.*, pp. 476-484.

the minister of justice.<sup>50</sup> The decree was therefore revoked and a new one issued in its place in 1908. This decree substituted a pass examination (*examen*) in the place of a competitive examination (*concurs*), increased the *stagiaire* requirement, and augmented the list of subjects on which candidates are examined, but at the same time it enlarged the exempt class to include various functionaries not exempted by the decree of 1906. The decree of 1908 is still in force, and it appears to have produced good results.<sup>51</sup>

## VII

### THE JUDICIAL TENURE

During the old régime, at least after the system of *venalité* had become an established practice, the tenure of the judges was permanent. He who had bought his judgeship could not be removed; otherwise judicial offices would have found no purchasers. The Revolutionists, however, introduced along with popular election the system of short tenures.<sup>52</sup> With the introduction by Napoleon of the system of executive appointment, the tenures of all judges except justices of the peace were made permanent, and they were declared to be irremovable, although Napoleon, in fact, did not respect scrupulously the principle thus proclaimed.<sup>53</sup> The charters of 1814 and 1830 proclaimed the principle of irremovability, and the disregard of it by the crown was the subject of frequent protest by the Liberals who took the position that appointment by the crown unaccompanied by permanence of tenure would reduce the judges to a position of subserviency. The principle of irremovability was also proclaimed by the constitutions of 1848 and 1852, and by the *senatus consultum* of 1870. The present constitution, as already stated, contains no provisions regarding the judiciary, but the judicial reorganization act of 1883 reaffirms the principle which some publicists regard as having become a well-established constitutional rule.<sup>54</sup> The judges, therefore, cannot be removed by the

<sup>50</sup> See Dehesdin, *op. cit.*, p. 452; Marchand, *op. cit.*, p. 167 and Demartial, *La nomination des magistrats*, 52 REV. POL. ET PARL. p. 88

<sup>51</sup> Cf. Marchand, *op. cit.*, p. 186.

<sup>52</sup> Justices of the peace were elected for two years, judges of the tribunals of first instance for six years, and councillors of the Court of Cassation for four years.

<sup>53</sup> Cf. Marchand, *op. cit.*, p. 27.

<sup>54</sup> Molliet, *Le pouvoir hiérarchique*, p. 85.

President of the Republic, or the minister of justice, but it would seem that they may be legislated out of office under the guise of reorganization, although in that case they are entitled to a pension if not to their salaries.<sup>55</sup> Nor can they be transferred from one court to another, if the transfer entails a diminution of rank or salary, except upon the advice of the Court of Cassation sitting as the superior council of the magistracy.<sup>56</sup>

There are certain judges, however, to whom the guarantee against removal does not apply. Such are the justices of the peace; this for the reason that until 1905 no professional qualifications were required of them, and, besides, they are members of the judicial police and are charged with the exercise of a few administrative functions. Many French writers contend, however, that they should be irremovable like other judges.<sup>57</sup> Likewise, the judges in Algeria and the colonies do not enjoy the benefit of irremovability. Nor do the judges of the administrative courts, because they are at the same time active functionaries of the administration.

The power of the government to remove the administrative judges has often been the subject of criticism, because, it is said, their dependence on the government makes them docile and servile instruments of the administration.<sup>58</sup> In practice, however, they are never interfered with and there have been no removals since the Second Empire. In fact they have shown a remarkable independence and have often decided important controversies between the government and private individuals in favor of the latter, sometimes to the serious discomfiture of the government.<sup>59</sup> The members of the *standing* magistracy of course are remov-

<sup>55</sup> Bonfils, *op. cit.*, p. 28; Alasseur, *L'inamovabilité des juges*, p. 20.

<sup>56</sup> The rule as to non-transfer has been a subject of attack by members of the Radical party who maintain that the government should be free to transfer a judge who by reason of his long residence, family connections and property interests in the community in which he resides is unfit to discharge impartially his judicial functions. Compare the Spanish and Portuguese law which forbids a judge to remain longer than eight years in the community where he has married, or if he or his family have acquired property there.

<sup>57</sup> See Alasseur, *op. cit.*, p. 29. In fact they are sometimes removed for political reasons though not frequently. See on this point an article in 16 REV. DE DROIT PUB. pp. 103 ff.

<sup>58</sup> In this respect the position of the French administrative judges differs from those of Germany, who are irremovable by the government.

<sup>59</sup> Instances are given in my article on Judicial Control of Administrative and Legislative Acts in France, 9 AMER. POL. SCI. REV. pp. 637 ff.

able because their functions are partly political.<sup>60</sup> While the practice of irremovability, subject to the exceptions mentioned, has become a well-established principle of French public law, it has not always escaped attack from certain quarters. It was criticised by Jules Favre, a great jurist, in his day,<sup>61</sup> and its abolition is now demanded by the Radical party.<sup>62</sup> They argue that the judiciary is still encumbered by a considerable number of judges who are hostile to republicanism, and that others are under the influence of clericalism.

Notwithstanding the fact that the principle of irremovability has always been affirmed as a rule of French public law since 1800, it has, in fact, been violated by nearly all the successive régimes that have ruled France. Napoleon after having proclaimed the principle, "purged" the magistracy in 1807, and again in 1810, of the judges who were hostile to his régime. The charter of 1814 affirmed the principle of irremovability, but, in fact, it was violated by the restored Bourbons who "chased from the bench" Napoleon's appointees.<sup>63</sup> The principle of irremovability was reaffirmed by the charter of 1830, but, in obedience to the demand of the Liberals, the government of Louis Philippe proceeded to purge the judiciary of a considerable number of Bourbon magistrates who were charged with being partisans of the dogma of divine right and secret enemies of popular sovereignty.<sup>64</sup>

<sup>60</sup> The judges of the court of accounts are, however, irremovable. The judges of the councils of *prud'hommes* and of the commercial tribunals being elected for definite terms cannot of course be removed by the government.

<sup>61</sup> *De la réforme judiciaire*, pp. 19, 99.

<sup>62</sup> See the resolution adopted by the party at its annual congress in 1902, Charpentier, *Le parti radical et radicale socialiste, 1901-1911*, p. 263.

<sup>63</sup> Alasseur, *op. cit.*, p. 81; Faye, *La Cour de Cassation*, p. 9. Faye says the great jurist Merlin, first president of the Court of Cassation, one president of a chamber, fourteen councillors, and two advocates-general were driven from their positions. A large number of councillors of the courts of appeal were also removed. In the south, the Napoleonic judges did not even dare to remain in the cities where they exercised their functions, so strong was the hostility toward them and so great was the danger to their lives. Malepeyre, *op. cit.*, pp. 107-108, says about one-half the Napoleonic magistrates were displaced and the others were required to adjure their imperialistic sympathies. The two groups, he says, always remained enemies, but they rivalled each other by the subserviency which they showed toward the new régime and by their efforts to prove their royalist sympathies.

<sup>64</sup> The downfall of the Bourbon régime in 1830 was followed by a widespread demand for an *épuration* of the judiciary. The dynasty, it was

Some of the judges appointed by Charles X refused to take the oath of allegiance to Louis Philippe and were thereby automatically removed.<sup>65</sup> The control of the government over judicial promotions was also effectively used against judges suspected of being out of sympathy with the new régime. The partisans of Charles X admitted that many of his judicial appointments were thoroughly bad; but they argued that it would be setting a dangerous precedent to violate the constitutional principle of irremovability by laying hands on the judiciary, and using it to serve party ends.

The downfall of the July monarchy in 1848 was not accompanied by any such widespread popular demand for an *épuration* of the judiciary as took place in 1830, for the reason that the magistrates, appointed by the government of Louis Philippe, were much less reactionary and subservient to the crown than those appointed during the Restoration. Nevertheless, the provisional government in 1848 issued a decree declaring that the principle of irremovability had disappeared with the abrogation of the Charter of 1830 and the minister of justice was authorized to

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said, had been changed, the chamber of peers purged, the *parquets* transformed and the administration reconstituted: why not purge the judiciary and thereby complete the revolution? Meantime riots, agitations, and demonstrations directed against the Bourbon judges were taking place in the provinces, the chief participants being those who alleged that they had been the victims of judicial persecution at the hands of Charles X's judges. At Metz the ceremony of reinstallation and oath taking of the old judges was marked by insults and threats directed against these unpopular magistrates. At Poitiers, Nancy and other places similar scenes took place. Judges were warned to resign, some were threatened with death; all were insulted. The bar of Clermont drew up a petition to the chamber of deputies demanding the removal of Charles X's judges; the people it was said had no confidence in them and there was no more reason why a judge's toga should be regarded as inviolable than that of a peer. See Picot, *op. cit.*, p. 90; Malepeyre, *op. cit.*, pp. 129 ff.

<sup>65</sup> Two presidents of the court of appeal, a vice-president, and eight judges of the tribunal of the Seine were removed in consequence of their refusal to take the oath. Alasseur, *op. cit.*, p. 93; Picot, *op. cit.*, p. 83. Altogether about one hundred sitting magistrates, or about one-twentieth of the total, were displaced. A much larger number of standing magistrates were dismissed. Nearly all the *procureurs* of the courts of appeal, more than fifty advocates-general and substitutes, and some 254 *procureurs* and substitutes of the tribunals were thus gotten rid of. The auditor judges were abolished on the ground that they had been used for political purposes, particularly to pack the courts in order to overcome majorities against the government.

remove judges in the public interest at his discretion. A number of Louis Philippe's judges were accordingly dismissed and a still larger number of standing magistrates were removed. This action of the provisional government, however, was not generally approved, and in the National Assembly of 1849 it was severely attacked during the course of a memorable debate on the question of irremovability.

Cremieux, the minister of justice, and one of the leading jurists of his time, however, defended the thesis of incompatibility between the principle of irremovability and the theory of republican government, and attempted to justify the removals made by him under the decree of 1848.<sup>66</sup> He was ably and eloquently answered by Montalembert and Jules Favre, both of whom contended that there was no popular demand for an *épuration* of the judiciary, and that the suspension of the rule of irremovability would introduce anarchy and chaos into the judicial establishment. This argument prevailed, the National Assembly by a vote of 344 to 322 affirmed the principle of irremovability, and it became a part of the constitution of the Second Republic. A decree followed, restoring the magistrates who had been removed by the provisional government in 1848.

With the downfall of the Second Republic and the establishment of the Second Empire, another *épuration* followed. Napoleon III asserted that the magistracy inspired neither the respect nor the confidence of the public, and a number of judges were removed.<sup>67</sup> The requirement of a new oath compelled several resignations, and a decree reducing the age limit at which judges were compelled to retire provided the means of getting rid of others still. One of the first acts of the government of the national defense in 1870 was to remove 900 members of the standing magistracy,<sup>68</sup> and this was followed next year by a decree removing fifteen judges of the sitting magistracy who had served as members of certain "mixed commissions" in 1852. Before the end of the year, however, this decree was annulled

<sup>66</sup> Perrier, *De la révocation des fonctionnaires*, p. 96.

<sup>67</sup> Napoleon, says Jules Favre, "chased out three councillors of the Court of Cassation with the sword after a gendarme under his orders had previously mutilated their registers." *Réforme judiciaire*, p. 23. Again, says Malepeyre, *op. cit.*, p. 150, the judges "flopped over," proclaimed their sympathy for Napoleon III, and even sent him an address of felicitation asking for the establishment of the Empire.

<sup>68</sup> Malepeyre, *op. cit.*, p. 152.

by the National Assembly on the ground that it was in violation of the well-established principle of irremovability.

The last *épuration* of the judiciary occurred in 1883. At this time the Republicans were in control of both the Senate and the Chamber of Deputies and a Republican President (Grévy) occupied the *Elysée*. They complained that many of the judges appointed by the government under the monarchist president, McMahon, were reactionaries and hostile to the Republican régime. The *Palais de Justice*, it was said, had become "the fortified camp of the enemy" and the judges were the "docile instruments" of de Broglie and McMahon. They were denounced not only for their hostility to Republicanism, but also for their severity toward offenders suspected of unfriendliness to the McMahon régime, and the elimination of all such magistrates was widely demanded. When Gambetta became the chief of *la grande ministère* in 1881 he promised this reform, but he went out of office before it was realized.<sup>69</sup> In the following year the government brought in a bill suspending the principle of irremovability, ostensibly to eliminate a large number of useless judges who, then as now, encumbered the judiciary, but in reality to enable it to purge the judiciary of anti-Republican magistrates. This bill was passed by the Chamber of Deputies, but it encountered strong opposition in the Senate where it was argued that the principle of irremovability had become a constitutional rule, and could not be suspended by act of the legislature. True, it had not been expressly affirmed by the constitution of 1875 but neither had the principles of the Declaration of Rights of 1789. Like the principles of 1789, it was not regarded therefore as necessary to reaffirm what had become a well-established principle of the public law of the country. As was well known, the constitution of 1875 was an *oeuvre d'urgence*, a compromise between political parties, an instrument which attempts to deal only with the organization and relation of the public powers, and is distinguished rather more for what it omits than for what it contains. Its silence, therefore, afforded no basis for an argument that the irremovability of the judges was not a constitutional principle.

The action of the National Assembly in 1871 (the body which subsequently framed the present constitution) in annulling the

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<sup>69</sup> Reinach. *La ministère Gambetta*, p. 295.

decree of the government of the national defense removing certain judges, this on the ground that the decree was contrary to the principle of irremovability, was evidence that the framers of the constitution of 1875 regarded irremovability as an established constitutional principle.<sup>70</sup> The minister of justice, however, argued that the principle of irremovability was only a statutory protection which might be withdrawn at will by the legislature, and this would seem to be the sounder view.<sup>71</sup> Nevertheless, the Senate refused to accept the bill in the form in which it passed the Chamber, and, as finally adopted, the words "irremovability is suppressed" were omitted. It provided, however, that within three months the government should proceed to reduce the personnel of the tribunals and the courts of appeal, the reduction to bear indiscriminately on the entire personnel, the number of magistrates to be eliminated not to exceed the number of seats suppressed. Thus, in form, the law was a reorganization measure, but, in reality, its purpose was to suspend the principle of irremovability—to enable the government to purge the magistracy. Under the authority thus granted, the government eliminated about 850 members of the sitting and standing magistracy.<sup>72</sup> That the law was, in reality, not a reorganization measure, but an *épuration* proceeding, is shown by the fact that no important changes were made in the organization of the judiciary, or in the mode of appointment, advancement or tenure of the judges.

These successive *épurations* constitute a regrettable chapter in the history of the French judiciary. With the incoming of each new *régime* many able magistrates were driven from the bench for no other reason than that they had received their appointments from a government which had been overthrown. As Coumoul aptly observes, although the principle of irremovability has always been regarded as one of the bases of French public law, it has been so often suspended for the purpose of eliminating magistrates who were suspected of being out of sympathy with the government at a particular moment, that it constitutes a precarious and illusory guarantee.<sup>73</sup>

<sup>70</sup> Cf. Perrier, *op. cit.*, p. 100; Alasseur, *op. cit.*, p. 26.

<sup>71</sup> Cf. Delpech, 21 REV. DE DROIT PUB. pp. 815 ff.

<sup>72</sup> Perrier, *op. cit.*, p. 97. Alasseur, *op. cit.*, p. 131, says 383 sitting magistrates and 231 standing magistrates were removed.

<sup>73</sup> *Le pouvoir judiciaire*, p. 320



## VIII

## RETIREMENT ON ACCOUNT OF AGE AND INFIRMITY

The guarantee against removal by the government does not mean life tenure for the judges, for they are now required to retire upon reaching a certain age. The first legislation on the subject was passed in 1824. This law provided for the creation, in each court and tribunal, of a commission composed of magistrates empowered to compel the resignation of any member of the court, who by reason of age or infirmity had become incapable of discharging effectively his duties. No age limit was prescribed by the law. Resignations were forced through intimidation, and pressure was exercised through the intermediation of the president and *procureur générale* of the court. It was a disagreeable and embarrassing duty thus imposed on the judges who constituted the commissions, and it appears to have been rarely exercised, and ultimately the law fell into desuetude.<sup>74</sup>

With the establishment of the Second Empire a decree was issued (1852) making it obligatory upon judges of the tribunals and courts of appeal to retire at the age of seventy and councilors of the Court of Cassation to retire at seventy-five. It was complained that the courts were then encumbered with aged magistrates who were not only incapable of performing their judicial duties but whose presence was an embarrassment to the courts in which they sat. While the pretext for the decree was to eliminate unfit judges, the real reason was political; that is, the desire of the Emperor to purge the courts of magistrates who were known to be hostile to his régime. The measure was vigorously opposed by all the judges, young and old alike, and was severely attacked by the bar and the writers on judicial reform.<sup>75</sup> The evil it did to the magistracy, says Béranger, was incalculable, since it not only compelled the retirement of many distinguished, able, and independent magistrates who were still in the vigor of

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<sup>74</sup> Picot, *op. cit.*, p. 355. The members of the commission, says Odillon Barrot, hesitated to expel their honored colleagues from the bench because of their age and few resignations were extorted. *Organisation judiciaire*, p. 77.

<sup>75</sup> Favre, *Réforme judiciaire*, p. 23; Barrot, *Organisation judiciaire*, p. 76; Picot, *op. cit.*, p. 352. It was an odious measure, says Favre, issued under the pretext of safeguarding the magistracy.

their powers;<sup>76</sup> but the vacancies which were thus created demoralized the magistracy by exciting among the remaining judges an ambition for advancement, which led to undignified solicitations, and opened the door to political influences.<sup>77</sup> In 1870, an effort was made to repeal the decree of 1852 but without success, and, like other decrees of that period it remains in force.

## IX

## REMOVAL FOR CRIME AND NEGLECT OF DUTY

Finally, the judges may be censured, reprimanded, suspended, or removed by the Court of Cassation sitting as a superior council of the magistracy, all the chambers united.<sup>78</sup> In all such cases the Court of Cassation acts upon the proposal of the minister of justice, and the government is represented by the *procureur-*

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<sup>76</sup> Odillon Barrot, who severely criticized the decree, remarks that he had pleaded before judges like Henrion de Pansey, Grandon Carnot, Lapaquy and others, all of whom, though over eighty years of age, were still in the vigor of their strength, and whose judgments, by reason of their long experience, enjoyed the highest authority. It was, he says, a sacrilege to require them to leave the bench. *Ibid.*, p. 75. Jules Favre, *op. cit.*, p. 58, criticizing the injustice of the decree, said: "I have seen a first president, who was still after long years of service the light of the great court of which he was the head, forced to retire while yet in the fullness of his moral and physical vigor, yet declared legally incapacitated when his eminent faculties demonstrated every day his usefulness by their incomparable superiority. Neither the authority which he had acquired nor the veneration and affection with which he was regarded nor the unappreciable value of his noble labor could save him."

<sup>77</sup> The "fever of advancement" which the resulting vacancies created among the remaining magistrates, says Malepeyre, led to the desertion of their posts by some judges who descended upon the chancellery to solicit promotions. The minister of justice was obliged to issue a circular warning the judges that they must remain at their posts and notifying them that no leaves of absence would be granted to enable them to solicit promotions personally from the chancellery. *Op. cit.*, p. 146.

<sup>78</sup> The power of the Court of Cassation to remove, does not extend to the Algerian and colonial judges who are removable by the government nor to the standing magistrates for the same reason nor to the judges of the commercial tribunals who are elected for definite terms. Until 1883, the disciplinary power over the magistrates was exercised by the respective courts to which they belonged but the law of 1883 with a view of unifying the *pouvoir disciplinaire* centered it in the Court of Cassation. Morillot, *La Cour de Cassation*, Conseil supérieur de la magistrature, chap. i.

*générale*. The accused magistrate is of course entitled to be heard in his defense. Among the grounds for which judges may be removed by the *Conseil Supérieur* are crimes and even misdemeanors of which they have been duly convicted, neglect of duty, scandals in private life, political activity, and acts which seriously compromise their dignity and character.<sup>79</sup>

By an extraordinary procedure known as *prise à partie*, an action in damages may be brought by an injured party against a judge, or even against the entire court for various acts committed in the discharge of their functions, such as fraud, conspiracy, extortion, arbitrary conduct, wilful denial of justice, etc. This proceeding is based on the principle that every individual is bound to make reparation to an injured party for his acts. It existed in the law of the *ancien régime* and was revived by Napoleon.<sup>80</sup> The courts of appeal have jurisdiction of such actions against justices of the peace; against judges of the tribunals of first instance, the commercial courts, the courts of assizes, and against magistrates of their own court. The Court of Cassation has jurisdiction of similar actions against the court of assizes as a whole, against the court of appeal entire, and against the councillors of its own court. If the petition to bring such an action is granted the case is tried by the court in solemn audience, all the chambers united. In case the action is held not to be well founded a fine of not less than 300 francs is imposed on the plaintiff; if the judge is convicted he or his heirs is condemned to pay damages in a certain sum.<sup>81</sup> The Radical party would go even further and make the judges liable in damages for judicial errors committed by them.<sup>82</sup>

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<sup>79</sup> The courts are forbidden to deliberate upon political matters and every manifestation or demonstration of hostility to the principle or the form of government is interdicted to magistrates. In 1882, a magistrate was removed for causing to be taken down from the façade of a court house on the 14th of July an illuminated sign bearing the words "Republique française" after breaking with his cane certain Venetian lanterns lighted with the national colors. In the same year a magistrate was removed for delivering an address at a royalist banquet in which he advocated the restoration of the Monarchy. See on the whole subject Faye, *La Cour de Cassation*, pp. 498 ff; Morillot, *op. cit.*; Alasseur, *op. cit.*, pp. 11 ff; and Durand, *De la discipline dans la magistrature*.

<sup>80</sup> Morizot-Thibault, *De la responsabilité des magistrats*, pp. 11-12.

<sup>81</sup> See on the whole subject of actions in the nature of *prise à partie* Faye, *La Cour de Cassation*, pp. 487 ff; Bonfils, *Traité d'org. jud.*, pp. 528 ff; Garsonnet, *Précis de procédure civile*, secs. 785 ff; Morizot-Thibault, *op. cit.*, and Rolland, 26 *REV. DE DROIT PUB.* pp. 723 ff.

<sup>82</sup> Charpentier, *Le parti radical et radicale socialiste*, p. 273.

## X

## PROMOTIONS IN THE MAGISTRACY

Although the French judges, with the exceptions mentioned, are protected against removal by the government, they are not protected against being kept indefinitely in the inferior posts where their judicial careers are usually begun. They are dependent upon the government for their advancement and therefore guarantee against removal means little unless they are assured the promotion to which their age, long service and talents entitle them. This is notably the case in France where the judiciary is hierarchically organized, where the judges are grouped in classes and grades,<sup>83</sup> each of which carries a higher salary and prestige than the one below and where original appointments are made of the lower posts, vacancies in the higher magistracy being usually filled by promotion from the inferior magistracy.<sup>84</sup> The situation is entirely different from that of England and the United States where the judges are not arranged in a multiplicity of grades or classes with different salaries, and where the system of regular promotion from the lower to the higher posts hardly exists, the higher judgeships, comparatively few in number as compared with those in France, being usually filled by appointments from the bar.<sup>85</sup> In France the bench and bar are two

<sup>83</sup> Thus we find in the French hierarchy, first presidents, presidents, presidents of chambers, councillors, judges, substitutes, *suppléants*, etc.

<sup>84</sup> Thus recently when a vacancy occurred in the court of appeal at Limoges, a judge of the tribunal of first instance at Paris was appointed to the vacancy. The vacancy at Paris was filled by the appointment of a substitute of the *procureur* of that tribunal; the latter vacancy was filled by the transfer of the *procureur* at Mons; the vacancy at Mons was filled by the promotion of a *procureur* in a smaller town and so on. Again, when a vacancy occurred in the court of appeals at Bourges, it was filled by the promotion of the president of the tribunal of Le Puy. So when a vacancy occurred in the court of appeal at Paris the vice-president of the tribunal of first instance of Paris was promoted to it, while the president of the tribunal at Rambouillet was transferred to the vacancy thus created at Paris. The consequence is that the French magistracy is characterized by extraordinary mobility. Barrot, *op. cit.*, p. 80, stated that within ten years more than sixty new magistrates arrived at the Paris court of appeals.

<sup>85</sup> In England the judges of the High Court and the court of appeal receive the same pay, and vacancies in both are usually filled by the appointment of the attorney-general or a prominent barrister. The idea that promotions are dangerous to the *morale* of the judiciary is so strongly entrenched in England that no county judge has ever been promoted to

separate and distinct professions and members of the bar are rarely appointed judges.<sup>86</sup> The French judiciary is a *magistrature de carrière*, and its posts are reserved for those who have prepared themselves especially for judicial careers. A successful candidate usually begins as a *suppléant* without pay, then he becomes a *suppléant* with pay, then a substitute, then a judge of a tribunal of first instance in a small town with a salary far less than is sufficient for his support. From this latter position he aspires to the presidency of the tribunal, then to the membership of the court of appeal and, finally, his crowning ambition is to wear the red robe of a councillor of the Court of Cassation.<sup>87</sup> De

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the High Court and there have been very few cases of promotions from any court since 1873. A judge who is appointed to the King's Bench, for example, usually remains there all his life. He has nothing to expect or to fear from the government, and is therefore under no temptation to solicit favors or to shape his judicial conduct to meet the approval of the government. There, also, appointments to the bench are never dictated or influenced by members of Parliament as is the case in France.

<sup>86</sup> Except of course *procureurs*, *procureurs-généraux*, and *avocats-généraux*, who belong to the standing magistracy and who are frequently transferred to vacant posts in the sitting magistracy.

<sup>87</sup> The actual working of the system is illustrated by what happened in 1912 when M. Ballot-Beaupré, first president of the Court of Cassation, retired. His place was filled by the appointment of M. Baudouin, *procureur-générale* of the Court of Cassation. The vacancy created by the promotion of M. Baudouin was filled by the appointment of a president of one of the chambers of the Court of Cassation. The latter vacancy was filled by the promotion of a councillor of the Court of Cassation. The vacant councillorship was filled by the transfer of the president of the court of appeal at Douai; the latter vacancy, by the transfer of the president of the court of appeal at Lille; the latter by the transfer of the president of the court of appeal at Dunkirk whose post was in turn filled by the appointment of the *bâtonnier* of the bar at Cambrai. The judicial career of the present president of the Court of Cassation affords another good illustration of how the system works. He began as a substitute at Chateaulin; from there he passed to a similar post at Quimper and later to Rennes; then he filled in succession the positions of substitute for the *procureur-générale* at Rennes, *avocat-générale* at the Court of Cassation, president of the tribunal of the Seine, and *procureur-générale* of the Court of Cassation, from which he was promoted to the presidency of the court eleven years later, at the age of sixty-six years, and after some forty years' service in the standing and sitting magistracies. M. Sarrut who succeeded him as *procureur-générale* of the Court of Cassation has had a somewhat similar career: *avocat-générale* at Grenoble, substitute for the *procureur-générale* at Paris, *avocat-générale* of the Court of Cassation, president of a chamber of the same court, and finally *procureur-générale*.

Tocqueville in his day complained that the judge gained his grades very much as the soldier in the army does.<sup>88</sup> A French judge never ceases to aspire until he has reached the summit of the hierarchy. His future is almost wholly in the hands of the minister of justice who may, if he wishes, keep an ambitious and able judge whose politics he dislikes in an inferior post all his life, or he may disregard the rule of seniority and promote a petty provincial magistrate to one of the highest courts in Paris or some other large city. Everything depends upon his will. Different from England, where hardly more than a half-dozen important judgeships are at the disposal of the government each year, hundreds, almost thousands, of vacancies in the French magistracy must be filled annually by new appointments or transfers. Naturally the minister of justice cannot be familiar with the qualifications of the hundreds who aspire to promotion and he, therefore, depends largely on recommendations. Unlike Napoleon who usually adopted the recommendations of the President and the *procureur-général* of the court in which the vacancy occurred, the ministers of justice to-day rely mainly on the recommendations of senators and deputies, who have the advantage of the former in that they can present their recommendations to the chancellery in person, whereas those of *procureurs-généraux* and presidents of the courts can only be communicated in writing. The disposition to do this is accentuated by the shortness of the ministerial tenure and the desire of the government to obtain the support of influential members of Parliament upon whom their own continuance in office depends.<sup>89</sup> No recommendation counts for so much as that of an influential senator or deputy who belongs to the party in power. Under these circumstances aspiring judges naturally turn to the senators and deputies with their solicitations, and those who are fortunate enough to have influential friends in Parliament are

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<sup>88</sup> *Démocratie en Amérique*, Vol. II, p. 178.

<sup>89</sup> Compare the satirical comments of Eugène Brieux in his drama *La Robe Rouge* (Act I, scene 2) where Mme. Vagret tells her husband that Manteuil has been appointed *avocat-général* although he was a *suppléant* at Luneville when M. Vagret was a substitute. Yes, replies Vagret, but he has a cousin who is a deputy. Then, says Mme. Vagret, we have no chance. Still, says M. Vagret, I have the formal promise of the *procureur-général*, to which Mme. Vagret replies, "Ah, but it is the recommendation of the deputy that you must have."

too often those who are rewarded.<sup>90</sup> In this way the independence of the judiciary has been seriously impaired, inordinate ambitions aroused, the judges have become perpetual solicitors,<sup>91</sup> their dignity and prestige abased, and a *milieu* created which causes their honesty and integrity sometimes to be suspected. Some Frenchmen have so far despaired of the situation as to advocate the return to the system of *venalité* which prevailed during the *ancien régime*.<sup>92</sup> The evil is not a new one. It has existed in France under all *régimes* since Napoleon's day and it has been a never ceasing object of criticism by judicial reformers. The liberals during the period of the Restoration protested against the employment by the government of the power of promotion to make obsequious and docile instruments of the judges, thus rendering illusory the guarantee of irremovability. The same complaint was made throughout the period of the July Monarchy. Appointments and promotions it was said were determined mainly by political considerations, friends and relatives of the deputies, and even the deputies themselves, being the chief beneficiaries. During the Second Empire the situation was still

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<sup>90</sup> Whenever there is a change in the ministry of justice, says Picot, the judges descend upon the *Palais Bourbon* and besiege the deputies for advancement, and the latter in turn besiege the chancellery. Such a spectacle, he adds, "is revolting and tends to impair respect for the judiciary." M. Joseph Reinach in the Chamber of Deputies, Dec. 13, 1906, described vividly the system of solicitations. "From the beginning to the end of the year," he said, "we are solicited and we solicit. We write or sign, twenty, thirty, forty or fifty letters a day, depending on the degree of influence attributed to us." The time of deputies he complained was largely taken up with appeals for appointments and promotions. Compare also the remarks of M. Steeg in the Chamber on May 8, 1907.

<sup>91</sup> The demoralizing effect of the *fièvre de l'avancement* with which the system inoculates the magistracy has been dwelt upon by many French writers. See especially an article by Rengade, *La magistrature et la démocratie*, 79 REV. POL. ET PARL. pp. 494-495, who takes the position that the rank and salary of all magistrates should be equal, and that the system of promotions should be abolished so as to free the judges from the control of deputies and eliminate politics from the judiciary. Brioux in *La Robe Rouge* (Act I, scene 6) satirizes the system. La Bouzule is made to say that the thing which makes bad judges of so many honest men is the "malady of advancement." "If they were not infected by this microbe they would be honest judges and gentlemen instead of cruel and servile magistrates. There are some who do not solicit promotions but they are obscure magistrates who have no ambition."

<sup>92</sup> For example, M. Faguet, the well-known literary critic. See his books, *Le culte d'incompétence* and *La horreur des responsabilités*.

worse, and, if we may believe the charges that one hears everywhere in France, the evil is still prevalent.<sup>93</sup>

All writers on the judiciary without exception have inveighed against the evil of such a system: Benjamin Constant, Rossi, Vivien, Laboulaye, de Tocqueville, de Broglie, Prévost-Paradol, Odillon Barrot, Picot, Malepeyre, Dehesdin, Desjardins, Coumoul, Jules Favre, M. Cruppi, and many others. Gambetta,<sup>94</sup> Favre and Jules Simon, three great pillars of the Third Republic, in their speeches in the early seventies attacked it as destructive of the independence of the judiciary. Odillon Barrot in his day declared that the "fever of advancement" and the dependence of the judges upon the government for their promotion was the "greatest reproach" against the magistracy. The late Professor Saleilles characterized it as the "supreme evil from which our democracy suffers."<sup>95</sup> Jules Favre said of it, "I know of no greater power of control over the judge."<sup>96</sup> It has been repeatedly attacked by reporters of the judicial budget<sup>97</sup> and by members of Parliament themselves,<sup>98</sup> by the General Prison Society

<sup>93</sup> In 1870 the question of freeing the magistracy from the control of the government was much discussed and a *projet* for this purpose was prepared by a commission composed of distinguished jurists including such names as those of Arago, Cremieux, Faustin-Helie, Dareste and others. Béranger speaking on the measure said: "It is not true that when a judge has once been invested with the robe, although irremovable, he is entirely dependent on the executive power for his advancement and that in consequence of the grades with which the judiciary has been so cleverly encumbered he is under the necessity of addressing himself every four or five years to the executive unless he wishes to remain where he started?" Quoted by Coumoul, *op. cit.*, p. 283.

<sup>94</sup> Notably in his celebrated speech at Belleville in 1870, and in his declaration as chief of the ministry in 1881.

<sup>95</sup> BULLETIN DE LA SOCIÉTÉ GÉNÉRALE DES PRISONS (Dec. 19, 1906).

<sup>96</sup> *Op. cit.*, p. 42.

<sup>97</sup> Notably by M. Cruppi who in his report on the budget of justice in 1903 referring to the control exercised by the deputies over judicial promotions said: "It is intolerable that men who are charged with the duty of judging their fellow citizens are dependent upon the influence of politicians for their security, their life, their salary, their daily bread, and their future." JOURNAL OFFICIEL, Ch. des Déps. (1903) Annexe, No. 1192, p. 1225.

<sup>98</sup> M. Joseph Reinach speaking on the budget of 1907 referred to "the sad and humiliating situation resulting from the régime of favoritism and solicitations." He read a letter from a magistrate who said: "if we do not solicit without ceasing we will never advance." "If we do not put an end to this abuse," M. Reinach added, "I shall prefer to return to the system of popular election, rather than see a system main-



and many other bodies interested in the reform of the judiciary.<sup>99</sup> Every year when the judicial budget is under debate the minister of justice calls attention to the abuses of the present system, and there are always some deputies who demand a change. But so far they have been in the minority.

A step in the direction of reform, however, was made by the decree of 1908, referred to above, which provides for the annual preparation of a list of judges (*tableau d'avancement*) eligible to and most deserving of promotion, and which prohibits the advancement in rank, or the increase in salary, of any judge whose name is not inscribed on the tableau.<sup>100</sup> The decree also reduces somewhat the number of grades and classes in the hierarchy. The tableau is prepared by the minister of justice on the advice of a commission composed of the first president, the *procureur-générale*, and four members of the court in which the vacancy is to be filled, together with four representatives of the ministry of justice. Any judge who thinks his name should be on the tableau may address a petition to a commission of classification composed of the directors of the ministry of justice and six councillors of the Court of Cassation. When a promotion is to be made the minister must make his choice from the names on the tableau, except that he is allowed to choose from names not on the list, a number equal to one-fourth the total number of vacancies occurring during the year. This decree diminishes to some extent the abuse of favoritism and arbitrariness on the part of the minister of justice, but it is evident that his discretion is still large and writers are not lacking who consider that the reform will result in little or no improvement.<sup>101</sup>

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tained in which magistrates are promoted upon the basis of the recommendations of Senators and Deputies." JOURNAL OFFICIEL (Dec. 13, 1906) pp. 3209-3210. See also to the same effect the remarks of Deputy Bompard on Dec. 10, 1900.

<sup>99</sup> See the discussion by members of the society, in the REVUE PENITENTIAIRE for Nov. 1904, July 1906, and Jan. 1907. Among the distinguished jurists who denounced the system at these meetings were Picot, Garçon, Larnaude, Saleilles and Berthélemy. Picot referred to it as "a spectacle of vagabondage and judicial mendacity."

<sup>100</sup> Tableaus of advancement had long been established in various branches of the administrative service and the extension of the principle to the magistracy was demanded by the judges and judicial reformers. On the whole subject see Dehesdin, *op. cit.*, pp. 336 ff.

<sup>101</sup> Cf. Demartial, 52 REV. POL. ET PARL. pp. 86 ff; Coumoul, *op. cit.*, p. 275; Signorel, Le contrôle de la magistrature, 57 REV. POL. ET PARL. pp. 84 ff.

## XI

## COMPENSATION OF THE JUDGES

In addition to the faults of a system which makes advancement in the magistracy largely dependent upon political considerations the French judges are inadequately, not to say miserably, paid. In this respect their situation forms a striking contrast to that of the highly paid British magistracy and even to that of the American judges. Aside from the slight augmentations made in the scale of salaries in 1883 for the judges outside Paris, there has been no increase since 1860, notwithstanding the fact that the cost of living has doubled or trebled. More than 600 *suppléant* judges receive no pay at all during the first five years of their service, and the other 200 receive only \$300 a year.<sup>102</sup> After five years as a *suppléant* the magistrate ordinarily becomes a judge of the tribunal of first instance, third class, at a salary of \$600 a year, or a substitute at \$480 from which five per cent is deducted for pensions.<sup>103</sup> Excluding justices of the peace, the majority of French magistrates belong to this category. By the time a judge is forty or fifty years of age he may become a councillor of the court of appeal or a judge of the tribunal of the Seine at a salary of \$1,500 or \$2,000 a year. The highest paid judges of course are the councillors of the Court of Cassation, the president of which receives \$6,000 a year, the presidents of the chambers \$5,000, the other councillors \$3,600. Councillors of the courts of appeal receive from \$1,000 to \$2,200, except the presidents of chambers, who receive from \$1,500 to \$2,700 according to the class to which they belong, and the first presidents of the court, who receive from \$3,000 to \$5,000. The salaries of judges of the tribunals of first instance range from \$480 to \$1,600, depending on the class to which they belong. Vice-presidents receive from \$675 to \$2,000 and presidents from \$720 to \$4,000.<sup>104</sup> Until 1905 the pay of justices of the peace was lament-

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<sup>102</sup> Recently the Chamber of Deputies agreed to raise the pay of salaried *suppléants* from \$300 to \$500 but the Senate rejected the proposal.

<sup>103</sup> The French judges are entitled to a pension upon the attainment of sixty years of age. It is, however, lamentably small, the maximum being \$1,400 a year, an amount which very few judges ever in fact receive.

<sup>104</sup> Jules Favre, *op. cit.*, p. 42, stated that, in 1877, 727 judges of first instance received less than \$600 a year; 349 received only \$540; 303 received only \$480.

ably small, more than 2,000 of them receiving only \$200 a year. By a law of that year, which was intended to rehabilitate these long neglected but highly important courts, the qualifications for appointment were raised, the justices were made eligible for promotion to the tribunal of first instance and their pay was increased. They are now divided into five classes with salaries ranging from \$500 to \$1,600 depending on the class and grade. There are still, however, more than 2,000 who receive only \$500 a year and less than 120 who receive as much as \$1,000.

Prior to 1883 there were some twenty different classes of judges with varying salaries. Thus there were six classes of judges of first instance, and six classes of councillors, of the courts of appeal. The law of 1883 reduced somewhat the number of classes but it is still large, a circumstance which increases the dependence of the judges on the government, and accentuates their temptation to solicit promotions. Frequent proposals have been made to abolish the system of classes and introduce the English and German systems of equality of rank and pay for all judges of the same court, but as yet such proposals have not met with favor.<sup>105</sup>

Strangely enough the classification of tribunals is based not on the amount of business which they handle, but on the basis of the population of the towns in which they sit. The absurdity of such a basis of classification becomes evident when we compare the populations of the districts as a whole. Thus the tribunal of Bethune falls in the third class, although the population of the district is over 300,000, while that of Barcellonette in the same class has a population of only 13,000. So the tribunal of Nîmes has seven judges, or one for every 24,000 inhabitants, whereas that of Bethune has six judges, or one for 52,000 inhabitants.<sup>106</sup>

Apparently everyone in France admits that the scale of judicial salaries (it is said to be the lowest in Europe except in Italy) is totally inadequate.<sup>107</sup> In the great majority of cases it is insuffi-

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<sup>105</sup> Jules Favre, *op. cit.*, p. 78, advocated such a remedy and it was urged by others in 1848, 1870 and 1880. Compare Picot, *op. cit.*, p. 349; and Dehesdin, *op. cit.*, p. 428.

<sup>106</sup> For other similar inequalities see Dehesdin, *op. cit.*, p. 425.

<sup>107</sup> de Jouvenal in his *La république des comrades*, p. 148, remarks that a French judge is gray with old age before his salary amounts to as much as that of a sub-lieutenant in the army. Compare on this point also Dehesdin, *op. cit.*, p. 157, Malepeyre, *op. cit.*, p. 183; and Favre, *op. cit.*, p. 44.

cient to support the judges. The Radical Party in particular has protested against a situation which, as it alleges, debars "many men of talent who are devoted to Republican institutions," and whose sympathies are on the side of the toiling masses—a situation which in practice makes it necessary to confine appointments to the well-to-do *bourgeoisie*, thus making the judiciary largely a body of men of aristocratic sympathies and predilections.<sup>108</sup> The judges themselves have of course complained bitterly of their miserable situation, and through their *association amicale* have repeatedly urged a policy of better treatment.<sup>109</sup> Writers on the reform of the judiciary, ministers of justice, and reporters of the judicial budget have for many years called attention to the inadequacy of the present scale of pay and have urged an increase. Jules Favre more than forty years ago declared that the poverty of the magistracy was not only a social crime, but still worse, it was the result of political calculation. He praised the English practice of paying the judges high salaries and of treating all judges of the same court alike in this respect.<sup>110</sup>

In 1911 and 1912 the reporter of the judicial budget referring to the inadequacy of the scale of compensation declared that the magistracy was confronted by a crisis owing to the paucity of

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<sup>108</sup> Charpentier, *La parti radical et radicale socialiste, 1901-11*, p. 265.

<sup>109</sup> At its annual meeting in 1914 the *Association amicale* expressed the opinion that a French magistrate could not live on his official salary. Contrary to the popular belief that the magistracy was composed of aristocrats and men of wealth, it declared that the great majority of the judges were men without private incomes and were wholly dependent on their small stipends for the support of themselves and their families. M. Malepeyre speaking before the *amicale* cited the pathetic case of a magistrate's widow who had no means with which to pay the funeral expenses of her husband. See also the BULLETIN OF THE AMICALE (Dec., 1913) which refers to several magistrates who had appealed for aid in consequence of their inability to live on their judicial salaries. Such is the lot of a magistrate, after fifteen or twenty years on the bench, says the TEMPS in commenting on the situation. M. Loubat, *procureur-général* at Lyon, says fully one-half the judges of France have no private income and that with rare exceptions the remainder have only modest fortunes. The situation of the great majority of them, he says, is lamentable. It is impossible for them to live on the same level with members of the bar, notaries, clerks, and even bailiffs, and in many cases they are unable to support their families, educate their children or provide marriage dowries for their daughters. Les idées de M. Faguet sur la justice moderne, 72 REV. POL. ET PARL. p. 260.

<sup>110</sup> *Réforme judiciaire*, p. 42.

candidates, so unpromising had the judicial career become.<sup>111</sup> In 1914 the minister of justice again called attention to the subject, referred to the fact that there had been no substantial increase in the pay of the judges since 1860, and declared that France spent less for the maintenance of her judicial establishment than any other European country.

Every proposal, however, to raise the pay of the judges has failed on account of the state of the treasury. M. Ajam, reporter of the judicial budget, in 1912 said it was impossible to provide for the increase which everybody admitted to be desirable, until there was a substantial reduction in the number of judges. The first step, he said, was to abolish the large number of useless tribunals and provide that those which remained should be held by a single judge. To an Englishman, or an American, this would appear to be the obvious remedy. This M. Viviani proposed in 1915, but like similar propositions in the past it was not adopted by Parliament for the reasons stated above.

## XII

### GENERAL ESTIMATE OF THE FRENCH MAGISTRACY

In spite of the rather miserable situation of the French magistracy resulting from the system of appointment and advancement, described above, and from a totally inadequate scale of compensation, it compares favorably in independence, ability, integrity and impartiality with that of any other country. The French judges have been the victims of every revolution and change of *régime* that has marked the checkered history of France since 1789. With the advent of each new *régime* they have been denounced

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<sup>111</sup> M. Cruppi, minister of justice, speaking on the subject in the Chamber of Deputies on Nov. 10, 1911, described the pay of the judges as "miserable" (*traitements de misère*). Already in 1903 he had declared that the magistracy was confronted by a crisis. "More and more," he said, "the judicial career is being abandoned by the *élite*; the *parquets* no longer find *attachés* and the most distinguished graduates of the law schools are turning towards more inviting fields."

The Paris *TEMPS* (May 6, 1913) referring to the "crisis" with which the magistracy was threatened for lack of candidates said there were at that time 200 vacant posts for which only fifty-three candidates had appeared. See also its issue of May 28, 1912. As early as 1898 there was a lack of candidates and since that date there has been a steady decrease. Compare Dehesdin, *op. cit.*, p. 180

and chased from the bench because they were suspected of being hostile to the government which succeeded that under which they were appointed. Exposed to the temptation to alter their political sympathies with every change of dynasty and compelled to solicit promotions to which long service and distinguished talents entitled them, they have found it difficult to retain always the public confidence or to escape the charge of complacency and servility.<sup>112</sup> The truth is, however, the French judges have always since the Revolution shown a remarkable independence as over against the government.<sup>113</sup> Recent examples may be found in abundance in the controversies between the government and the religious congregations. Hundreds of ill-founded prosecutions against these establishments were instituted by direction of the government, and, when it was beaten in the tribunals, it carried the cases to the courts of appeal, only to find the judges there, as below, firmly resolved to resist the government whenever it exceeded the authority which the legislature had given it.<sup>114</sup> Even the administrative judges, who are always removable at the will of the government, have uniformly since the establishment of the Third Republic decided against the government, and upheld the rights of private individuals in cases where their rights were safeguarded by law, this sometimes in the face of

<sup>112</sup> This charge has recently been made by the late Emile Faguet, the well-known literary critic in his two books, *Le culte d'incompétence* and *La horreur des responsabilités*.

<sup>113</sup> M. Loubat relates that on one occasion Napoleon being strongly opposed to a decision which affected the treasury charged one of his confidants with interviewing that great magistrate Henrion de Pansey, president of the Court of Cassation, with a view to securing a modification of the decision. de Pansey replied that the decision could not be reversed. But His Majesty requires it, said the interviewer. Tell His Majesty, said de Pansey, that it is better for the treasury to lose a million than to have the authority of the Court of Cassation diminished by an act of injustice.

<sup>114</sup> Compare Loubat, *op. cit.*, p. 250. On the independence of the French judges see Picot, *op. cit.*, pp. 143 ff. There have occasionally been charges that the government sometimes attempts to control the decisions of the judges, e. g., the cases of the *Union Général*; the *Panama* cases; the *Dreyfus affaire*; the *Humbert* case; and that of *Rochette*. See Jouvenal, *La république des comrades*, p. 148. But the attempts have not usually succeeded. M. Loubat examines and answers some charges of this kind made by M. Faguet and he points out that under the system of plurality of judges it would be difficult for the government to take revenge upon the magistracy for decisions which it disapproved, owing to the impossibility of fixing the responsibility upon a particular judge.

strong pressure exerted by the government.<sup>115</sup> If anything, they have shown a greater independence even than the judges of the judicial courts and the government has never, at least since the Second Empire, dared to remove one of them for lack of subserviency.

Again, it is the almost unanimous testimony of French jurists and text-writers that the judges have been remarkably impartial in their judicial conduct. Charges of arbitrariness and excessive severity such as are sometimes made against the English judges are almost unknown in France.<sup>116</sup> On the contrary it has been complained that the French judges rather go to the opposite extreme and exhibit an excessive indulgence toward accused persons.<sup>117</sup> French judges certainly enjoy the reputation in their own country of being unusually sympathetic and lenient toward persons accused of crime.

Finally, French jurists, members of the bar, and writers on the judiciary have all united in rendering homage to the judges for their integrity and incorruptibility. Odillon Barrot, who in his day criticised the organization of the judiciary and deplored the influence of politics and favoritism in appointments and promotions, paid a high tribute to the ability, independence and integrity of the magistracy as a whole. "Justice with us," he declared, "is pure and without stain."<sup>118</sup>

Jules Favre, the eminent jurist and statesman, writing a few years later, declared that the French judges were incorruptible. "They cannot," he said, "be eulogized enough; if they suffer from the evils of the system, no one can withhold the tribute of homage for their integrity, austere habits, and above all, for the heroic courage with which great numbers of them face the poverty of their situation."<sup>119</sup> Malepeyre, one of the most authoritative writers on the French judiciary, says "the magistracy is not inferior to that before the Revolution (M. Faguet to the con-

<sup>115</sup> I have cited a number of cases in illustration of this fact in an article entitled *Judicial Control of Administrative and Legislative Acts in France*, 9 AMER. POL. SCI. REV. pp. 637 ff.

<sup>116</sup> The Radical Party sometimes, however, in its annual congresses adopts resolutions criticizing a particular judge for partiality, or undue severity, but like similar charges occasionally directed against American judges they are usually without foundation.

<sup>117</sup> See my article on *Criminal Procedure in France*, 25 YALE LAW JOURNAL, p. 266.

<sup>118</sup> *De l'organisation judiciaire*, p. 12.

<sup>119</sup> *Réforme judiciaire*, p. 43.

trary notwithstanding); if its professional standing has not increased it is more impartial and independent."<sup>120</sup> The French magistracy, says M. Cruppi, is enlightened, industrious, sincerely republican, and its probity has never been suspected.<sup>121</sup> In spite of parsimonious treatment and an unjust mode of recruitment, our magistracy, says M. Jousserandot, is one of the most respected, and justly so, of any of Europe.<sup>122</sup> Literary men like Faguet,<sup>123</sup> Anatole France,<sup>124</sup> and Eugene Brieux,<sup>125</sup> have caricatured the system of justice in France, but not even they have reproached the judges for want of integrity and honesty. M. Brieux puts into the mouth of one of his characters the following tribute to the personal integrity of the judges:

"Among all our 4,000 magistrates there is not one—even among the poorest and the humblest, who would accept money to modify his judgment. Here is the glory of the monopoly of the magistracy of our country. We salute it."<sup>126</sup> "When we summarize the excellencies and the faults of the French magistracy," says M. Loubat, the distinguished *procureur-général* of Lyon, "we are obliged to recognize that the balance is in its favor. Badly recruited, badly treated in respect to advancement, poorly paid, attacked from all sides high and low, merely defended, it is profoundly honest and upright. It is the image of the French spirit, animated by honesty, justice and good sense."<sup>127</sup>

JAMES W. GARNER.

UNIVERSITY OF ILLINOIS.

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<sup>120</sup> *Op. cit.*, pp. 4-5.

<sup>121</sup> See his report on the budget of the judiciary for 1901.

<sup>122</sup> *Op. cit.*, p. 5.

<sup>123</sup> In the two books already cited.

<sup>124</sup> *La Crainquebille*.

<sup>125</sup> *La Robe Rouge*.

<sup>126</sup> Act I, scene 6. He adds, however: "but a great number of them are ready to make complacencies and capitulations when it involves being agreeable either to an influential elector, a deputy or a minister who distributes places or favors. Universal suffrage is the god and the tyrant of the magistrates."

<sup>127</sup> Les idées de M. Faguet sur la justice moderne, 72 REV. POL. ET PARL. p. 267.